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RE B AND G (MINORS) (CUSTODY)

Court of Appeal (Civil Division)

[1985] FLR 493, [1985] Fam Law 127

HEARING-DATES: 19 September 1984

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CATCHWORDS:

Children - Custody - Parents members of cult of scientology - Divorce - Mother ageeing that father should have custody of children - Mother subsequently leaving scientology and seeking custody after 5 1/2 years - Father and step-mother commited scientologists - Nature of cule of scientology - Both parents loving and able to offer good home - Whether nature of scientology justified taking children from the care of the father

HEADNOTE:

The parents, who were then both scientologists, separated in 1978 and were divorced in 1979. There were two children of the marriage and when the parents separated in 1978 the children remained with the father. The mother had wanted custody of the children but as a result of pressure from scientologists reluctantly agreed that the father should have custody. In the divorce proceedings an agreed order was made to this effect; it was also agreed that the mother should have liberal access. Both parents remarried and their new partners were also scientologists. In 1981, however, the mother and the step-father ceased to be scientologists.

In September 1982 the mother indicated through solicitors that she wished to have custody of the children. The father would not agree to this and the matter came before Latey J in wardship proceedings in June 1984. The judge found that the children were happy and well looked after by the father and that he and the step-mother provided a warm, close family circle in which the children were thriving. He also found that the children loved their mother and were fond of their step-father and that they too had a close family circle. However, the judge heard evidence as to the nature of scientology and found that it was immoral and socially obnoxious, that it indulged in infamous practices to its adherents who did not comply unquestioningly to its doctrines, and that it was dangerous because it set out to capture children and impressionable young people and indoctrimate and brain-wash them so that they became the unquestioning captives and tools of the cult, withdrawn from ordinary thought, living and relationships with others. He refused to accept the father's assurances that he would not involve the children in scientology until they were old enough to decide for themselves and that he and the step-mother would stand back from scientology while the children were growing up. The judge further found that, even if they wanted, the father and the step-mother would not be able to escape the influence of the 'church' of scientology whilst remaining committed scientologists. He was of opinion that were it not for the issue of scientology it would be in the interests of the children to remain in the care of the father, but that the scientology factor was such that the children would be gravely at risk if they remained in the father's care. Therefore he ordered that the children be committed to the care and control of the mother.

The father appealed.

Held - dismissing the appeal -

(1) In wardship proceedings the interest and welfare of the child was paramount both in the practice and procedure to be adopted as well as the substantive law. In this case it was in the interests of the children that the judge should hear evidence about scientology and should make definitive findings upon it, otherwise he could not assess the risk to the children. The judge was obliged to make findings of fact on the nature of scientology, even though the 'church' of scientology was not a party and did not have an opportunity of being heard and he was justified in his findings as to the dangers to the children if they were brought up under the aegis of scientology. Although the judge had expressed strong disapproval of scientology in general, he had carried out the essential balancing exercise and exercised his discretion judicially having regard to those aspects of scientology essentially relevant to the welfare of the children.

(2) There was ample material on which the judge was entitled to take the view that he could not rely on the father to fulfil his assurances about bringing up the children and removing them from the evil influences of scientology. This involved establishing not only that the father was a truthful and reliable person but also that he could make good his promises notwithstanding the proven climate of scientology. The evidence demonstrated that the father was an unreliable witness and that where convenient mendacity was an integral part of scientology and justified the judge's finding that, whilst the father remained totally committed to scientology, he would be powerless against the pressures of the 'church'.

Decision of Latey J [1985] FLR 134 affirmed.

CASES-REF-TO:
H (A Minor) (Custody:Religious Upbringing), Re(1981) 2 FLR 253
F v C [1970] AC 668; [1969] 1 All ER 788
K (Infants), Re [1965] AC 201; [1963] 3 WLR 403; [1963] 3 All ER 191
L (Minors) (Wardship:Jurisdiction), Re [1974] 1 WLR 250; [1974] 1 All ER 913
T (Minors) (Custody:Religious Upbringing), Re (1981) 2 FLR 239

COUNSEL:
Robert Johnson QC and Michael Russell for the father;
Michael Kennedy QC and David Hart for the mother.

PANEL: Dunn, Purchase LJJ

JUDGMENTBY-1: DUNN LJ

JUDGMENT-1:
DUNN LJ: This is an appeal from an order of Latey J which he made on 23 July 1984 where by he granted the care and control of two wards of court to the mother and also gave her leave to take the children out of the jurisdiction permanently to a commonwealth country. The decisive factor in the judgment was that the father and step-mother are both scientologists. The judge formed the view that it would not be in the interests of the children to be brought up as scientologists.

The basis of the appeal is that the judge attached too much weight to the issue of scientology and, in any event, should have accepted certain assurances given by the father in the witness-box limiting the connection of the children with scientology. The background history of the case is set out in detail in the judgment and I do not propose to repeat it. The following facts, however, are material and may be stated shortly.

The children are a boy of 10 and a girl of 8. Both the parents were originally scientologists. The mother and the step-father ceased to be scientologists in about 1981. The mother and the step-father and their 4-year-old child live in a commonwealth country, although since January 1984 the mother has lived in this country, but she and the step-father intend to return to the commonwealth country after the conclusion of this case.

The father and the step-mother and a 10-year-old boy by the step-mother's previous marriage, together with their child of 3 all live in East Grinstead which is near the headquarters in this country of scientology. They expect another child very shortly.

Following the separation the mother agreed that the father should have custody of both the children and it was also agreed that there should be liberal access to the mother. A consent order to that effect was made following a decree nisi in September 1979. In 1980 there were proceedings before what is called the 'chaplain's court', which is a tribunal set up by the scientologists and which, in effect, confirmed the custody order which had been made in the court of law, and an agreement was drawn up under the auspices of the chaplain's court which provided for generous defined access to the mother in the commonwealth country.

It is right to say that the access terms have been loyally observed by the father. The evidence, including the evidence contained in the welfare officer's report is that the children are happy and well looked after by the father. They get on well with the other two children, especially the older boy who is very close in age to the elder ward. They have been described - and this was accepted by the judge - as a warm, close family circle in which the children are well cared for and thriving. They are presently at a local school at East Grinstead, the governing body and all the teachers of which (apart from some temporary staff) are scientologists. Although the school provides a conventional education it is under the aegis of scientologists and almost all the children are scientologists.

Apart from a period in 1982 when the mother kept the children after a period of access and took them to the United States in circumstances to which I shall refer later in this judgment, the children have been continually in the care of the father since the separation in 1978, that is to say for a period 5 1/2 years. It is not surprising from the recital of those facts that the judge held that were it not for the issue of scientology it would be in the interests of the children for them to remain in the care of the father, but he held that the scientology factor - as he called it - tipped the scales the other way in favour of the mother.

The hearing lasted for 3 working weeks approximately. It was mostly occupied with evidence about scientology, both in general and in relation to the circumstances of the family at East Grinstead. The judge had before him

numerous documents from the 'church' of scientology itself and he also heard the evidence of a number of witnesses on all aspects of the case, including a Dr Clark and a Mr Armstrong on the general aspect of scientology. He accepted the evidence of those two witnesses.

The judge reserved his judgment for nearly 3 weeks, and of the judgment of 52 pages, 35 were taken up with a review of the evidence to which I have just referred in answer to the question which he posed: 'What is scientology?' He reached his conclusion and expressed himself at p 157B ante in the following way:

'Scientology is both immoral and socially obnoxious. Mr Kennedy did not exaggerate when he termed it "pernicious". In my judgment it is corrupt, sinister and dangerous.'

He then gave his reasons for using those three words.

While he was in the witness-box the father offered certain assurances or undertakings if the children were allowed to remain with him. In general terms, without using the precise language of the father, they were, first, that he would, if required, move the children from their present school and send them to a conventional school locally: secondly, he would not involve the children in scientology until they were old enough to decide for themselves; thirdly, he and the step-mother would (as he put it) stand back from scientology while the chilren were growing up.

The judge refused to accept these assurances. He found that the father and step-mother, though in all other respects perfectly decent people and good parents, were both afflicted by what he called 'scientology blindness'. He found, effectively, that even if they wanted to they could do nothing against the power of the 'church' and that:

'The baleful influence of the "church" would in reality still be there and the children would remain gravely at risk . . . '

if they were allowed to remain with the father and step-mother. He found that the children loved their mother and were fond of their step-father; that she too had a close family circle waiting for them in the commonwealth country; and, while recognizing that there would be an upheaval which would be distressing for a time, he concluded that the scales came down decisively in favour of moving them to the mother in the commonwealth country.

In this court Mr Johnson made a primary submission that the judge failed to exercise his discretion judicially. He gave judgment in open court, although this was opposed by counsel for the father. He made findings of general application about the practices of scientology, which he said were of general public moment, for the express purpose of protecting the public in general from being gulled and duped by scientology, and he made those findings without the 'church' of scientology being given an opportunity to be heard.

Mr Johnson submitted that the judge became, or appeared to become, so preoccupied with the issue of scientology in the abstract that he failed to apply, or appeared to fail to apply, his mind to the relevant issue. That is to say what was in the best interests of these particular children taking into

account all the circumstances of the case including the circumstance that the father and step-mother were scientologists and, on the father's primary proposal, that the children would remain at their present school and be brought up as scientologists.

Alternatively, said Mr Johnson, in so far as the judge did apply his mind to that issue, his feelings against scientology were, or appeared to be, so strong that he was, or appeared to be, unable to perform the proper balancing exercise judicially.

Finally, Mr Johnson submitted that the judge should have accepted the father's assurances and allowed the children to remain with him subject to limitations as to the impact of scientology on their lives on similar lines to limitations imposed in the Jehovah's Witnesses cases such as Re T (Minors) (Custody: Religious Upbringing) (1981) 2 FLR 239 and Re H (A Minor) (Custody: Religious Upbringing) (1981) 2 FLR 253.

Before I consider these submissions, I turn to another criticism of the judgment made by Mr Johnson. In the summer of 1982 the children were with their mother in the commonwealth country pursuant to the agreed provision for access. By that time the mother and the step-father were no longer scientologists. On 2 September 1982 the mother's solicitors wrote to the father in the context that the children were due back with the father on 13 September. The mother's solicitors said this:

'Upon their recent arrival both children expressed to our client a strong desire to remain with her. The children have expressed similar wishes on previous visits, however their persistence in expressing their wish on this occasion has greatly concerned our client. This and other considerations caused our client to approach us to seek a change in the present custody order affecting the children. To enable the position to be fully considered we have obtained the advice of (local) leading counsel and we have given to counsel for their consideration all relevant material including copies of the submissions made to the scientology chaplain's court in 1979. It is the considered view of the counsel and of ourselves that an application for custody by our client would have considerable merit. The following matters lend weight to the merit of the children remaining with our client.'

They then set out six matters, including the wish of the children and the fact that the mother had resiled from scientology and was extemely bitter that the scientology organization had coerced her into allowing the father to obtain a custody order. The ends:

'Our client has been advised that, but for her own involvement with scientology and her then acceptance of that organization's dictates, she would have received custody of the children had that issue been considered by the proper authority in 1979. There are now congent reasons why the position should be reconsidered. While our client is prepared to use all means at her disposal to alter the present custody arrangement, she is desirious of avoiding emotional strain upon the children which would be an inevitable consequence of a contested custody hearing. For that purpose she has asked us to seek your consent to her having custody of the children.'

On receipt of that letter the father applied to Anthony Lincoln J in the Family Division and on 17 September he made an order that the children should be returned forthwith to the jurisdiction and the father himself went to the commonwealth country, arriving on 6 October. On 8 October the commonwealth court made an interlocutory order ordering the return of the children to the father. The father went round to the mother's house. He saw the children, but 2 days later - on 10 October - while the father was still in the commonwealth country, the mother, without telling him, took the children to the United States, of which the step-father was a citizen.

There were further court hearings in the commonwealth country and further orders to the same effect were obtained. The father followed the mother and the children to the United States. He ultimately located them. He consulted lawyers there and, as a result of the action of those lawyers, the children were returned to the father and returned to this country on 14 November 1982. They have been here ever since and, happily, that incident does not appear to have affected the access arrangement, because the mother came over to this country, as I said, in January 1984 and there has been regular access since then.

The judge dealt with those events in this way. Having shortly recited the facts, he said at p 138C ante that the mother took the children to the United States:

'. . . because she was in fear of losing them. She was cross-examined at some length about whether she did this knowing that an interim order had been made' [in the Commonwealth country] 'restraining her from removing the children. It does not affect the question I have to decide. It goes to credibility. On the balance of probabilities she was told. Whether and to what extent she grasped it is another matter. As a result of the father's arrival she was in a state of shock. She knew that he had come to get the children if he could and was in great fear that he would succeed. It is understandable that she did not absorb the niceties. She impressed me throughout as a wholly honest person. Nonetheless, she should not have done what she did do. It was done in panic. It was not in the better interest of the children. Nor was it right not to keep the father informed of the children's well-being. Apart from this one matter, so far as I can recall, her credibility has not been impugned.'

Mr Johnson submitted that the judge, in that passage, applied the wrong test and that he minimized the conduct of the mother in taking the unilateral action which she did contrary to the orders of the court and the knowledge of the interim order which had been made in the Commonwealth country, and failed to balance her conduct on that occasion with the conduct of the father, who had loyally followed the agreement with regard to access and had taken proper legal steps to recover the children when they were removed in that way by the mother. Mr Johnson also submitted that this incident vitiated one of the judge's criticisms of the father that he had no regard for the law and only obeyed the directions of the chaplain's court.

The principles to be applied in what are sometimes known as 'kidnapping cases' or cases where unilateral action is taken are well established and stated by this court in the case of Re L (Minors) [1974] 1 WLR 250. Buckley LJ, having referred to the case of J v C [1970] AC 668, which confirmed and explained that in wardship and custody cases the welfare of the child is the first and paramount consideration, went on at p 264C to say:

'How then do the kidnapping cases fit these principles? Where the court has embarked upon a full-scale investigation of the facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping a child is doubtless one of the circumstances to be taken into account and may be a circumstance of great weight; the weight to be attributed to it must depend upon the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the "kidnapper" the child should remain in his or her care . . . or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed. . . .'

In so far as the judge regarded the action of the mother in removing the children in the way in which she did - clandestinely and taking them to America - merely as a matter of credibility, with respect to him he as wrong. It was a circumstance to be taken into account in considering where the true interests of the children lay. It was relevant, as it always is, to the sense of responsibility of the parent concerned. The judge must have had this in mind because he found in terms that the action of the mother was not in the best interests of the children, but he went on to consider the circumstances of the case including the state of mind of the mother at the time, and in the end he attached little weight to the incident. For myself I cannot say that he erred in so doing, or that his failure to direct himself in accordance with the test laid down in Re L (above) constituted an error of law which, standing by itself, entitles this court to interfere with the general exercise of his discretion.

I turn now to deal with Mr Johnson's alternative submission, namely that the judge should have accepted the father's assurances about the bringing up of the children and removing them from the influences of scientology. The judge found that the father had lied about scientology when it suited himself. He gave a number of examples of inconsistencies between the evidence which he gave in the witness-box and, in particular, his submissions to the chaplain's court. He found that he could not rely on the father's evidence and, hence he could not rely on him to fulfil the various assurances which he had given. He pointed out that in any event they would be extemely difficult to carry out in practice unless the other two children of the family were also involved.

Mr Johnson referred us to numerous passages in the transcripts of the evidence of the father, where he said in effect that he had never been subjected to pressure from the 'church' and sought to distance himself from the undesirable practices which had been disclosed in the evidence, saying he knew nothing about them and, in any event, they did not apply to East Grinstead. Mr Johnson submitted that the judge gave insufficient weight to this evidence.

The assessment of the reliability of a witness in a matter of this kind is peculiarly for the judge who has seen and heard the witness. The judge saw this father in the witness-box for about 3 days. This was an issue not of capacity as a parent, which is often difficult for a judge to determine simply by observing the demeanour of the parent in the witness-box, but a straight issue of credibility. We have read most of the transcripts of the father's evidence and, in addition to the specific matters referred to by the judge, there were numerous occasions when the father avoided the issue or was evasive and, in some cases, gave inconsistent evidence.

The question of auditing, which is an important matter, was one of the most striking. Auditing has been variously described as being equivalent to psychotherapy; equivalent to a Christian confessional; and, by the judge, as brainwashing. In his evidence-in-chief the father was asked by Mr Johnson whether the children had ever been audited. He said they had not in any sense of the word that had been used in the court. He went on to say:

'I did a 20-minute exercise with them to help them at school. I remember it distinctly. I had them both with me in my bedroom. It was not a formal auditing session in any sense of the word and we did this exercise which was more like a game than anything else.' When he was cross-examined 2 days later his submission to the chaplain's court was put to him. It was pointed out to him that in his submission he had said: 'I have audited the boys' to which he replied 'Yes'. Then counsel said:

'Per child scientology section of VMH> What is VMH?

A 'Voluntary minister's handbook.'

Q 'On self analysis process with good results.' [This is quoting from the submission. The question went on:] 'Is that the little 20-minute or 10-minute session that you were talking about?

A 'It is'.

Q 'You gave the boy two, didn't you, two sessions?'

A 'I thought it was just one.'

It is perfectly plain from that answer that his original answer to Mr Johnson that it was just a game was wrong, and that what he had done was to audit the child in accordance with the scientology handbook. He also prevaricated about his knowledge of the allegations against Mr Ron Hubbard, the founder of scientology, in 1980, maintaining at first that he did not know there was anything wrong with scientology until he saw the mother's evidence in 1984 and eventually being forced to admit that, at any rate by 1983, he know that Mrs Hubbard and other top members of the 'church' of scientology had been convicted and sent to prison in the United States.

He also gave inconsistent evidence about the definition of 'suppressive acts' which is an important tenet in the teachings of scientology. He also, as Mr Kennedy put it, lied to the court about his involvement with the chaplain's court in persuading the court to rescind a permission which the mother had obtained to take custody proceedings in the ordinary courts of law.

It is significant that, although the father described some of the practices of scientology revealed in the evidence as horrendous, and said he would now have to reassess scientology in the light of that evidence, he nowhere suggested in his evidence that he would give it up. The furthest he would go was to say that if he found that the evidence which had been given in the court was true, then he might consider giving it up. In my judgment, there was ample material in this case upon which the judge was entitled to take the view that he could not rely on the father to fulfil his findings on that issue.

It remains to consider Mr Johnson's primary submission, namely that the judge's mind was so affected - or appeared to be so affected - by his strong disapproval of scientology that he was unable to exercise his discretion judicially. The judge was concerned, as are all judges in this jurisdiction, with the balancing of risks. One of the judge's primary tasks was to assess the nature and extent of the risk to the children if they were brought up as scientologists. The mother deployed a large body of evidence which was highly critical of scientology. It consisted partly of the 'church's' own documents, as I have said, and partly of the oral evidence of witnesses which the judge accepted.

The father gave evidence to the effect that the undesirable elements of scientology never impinged on his family, but he called no general evidence and no evidence from any officer of the 'church' of scientology as to its practices, although the mother's affidavit evidence had been available to the father long before the hearing. The judge dealt with this, at p 135H ante early in his judgment. He said:

'It is important, indeed essential, to stress from the start that this is neither an action against scientology nor a prosecution of it. But willynilly scientology is at the centre of the dispute of what is best for the children. The father and his counsel have stressed that they are not here to defend scientology. That is ture in the strict sense that the "church" of scientology is not a party to the proceedings. But they have known from the start what the mother's case is. It is plainly set out in the affidavits. If there remained any doubt it was dispelled by Mr Kennedy for the mother at a hearing for directions in January 1984. The father's solicitor is a scientologist. He has been in communication with the solicitors who act for scientology. There has been ample time and opportunity to assemble and adduce documents and evidence in refutation of the mother's allegations. None had been adduced. Why? Because the mother's case is based largely on scientology's own documents and as the father's counsel, Mr Johnson, candidly, albeit plaintively, said:

"What can we do to refute what is stated in scientologys own documents?"

Mr Johnson criticized that passage. He submitted that there had been a breach of natural justice in so far as the judge had made definitive findings on the practices of the 'church' of scientology without the 'church' being a party or without it having any opportunity to be heard. He relied on this as one of the matters which would justify this court as interfering with the discretion of the judge.

It is important always to remember that wardship proceedings are different from ordinary civil proceedings inter partes. In wardship proceedings the interest and welfare of the child is paramount, both in the practice and procedure to be adopted as well as the substantive law. This was made plain by the House of Lords in the case of Re K [1965] AC 201. I do no more than refer to the headnote:

'The paramount consideration of the Chancery Division in exercising its jurisdiction over wards of court was the welfare of the infants; that this jurisdiction was of its nature a paternal jurisdiction, and that, therefore, a ward of court case partook of an adminsitrative character and was not a mere conflict between parties.'

That was a case in which there had been a complaint that a confidential report by the Official Solicitor was not shown to the parents who were parties to the case. It was said that although the parents were parties and although if it had been an ordinary lis inter partes they would have been entitled to see the document, because it was not in the interest of the child that they should see the document the document was witheld. In this case it was in the interests of the children that the judge should not only hear evidence about scientology but should make definitive findings upon it, otherwise he could not assess the risk to the children if they continued to be brought into contact with the father. In any event, no application was made to the judge for the 'church' to be joined as a party and there has been no appeal against the refusal of the registrar to allow an application for the 'church' to be joined in this court.

We were told by Mr Johnson that a deliberate decision was taken on the father's side that the case should be run on the basis that scientology had little to do with welfare of the children and that the evidence to be called by the father should be confined to the impact of scientology on the children's lives without going into detail as to the theory and the various beliefs of scientology in the abstract. It is not for this court to make any comment upon that decision, but the effect of it is that the evidence was all one way. The judge was obliged to make findings of fact upon the evidence; it was his duty to do so and he did so. Mr Johnson complains that he did so in unnecessarily trenchant and, in some places, emotive terms. He complains particularly about a passage in the judgment at pp 140E to 141B ante which concludes with the sentence that Mr Hubbard is a charlatan and worse. The evidence for that is set out by the judge on the basis of various lies told by Mr Hubbard about his war service and his qualifications and other matters.

Mr Johnson submits those were matters which the judge should not have taken into account and that is a classic reason for questioning his discretion. It seems to me, with respect, that it was unnecessary for the judge to have gone into the detail which he did, but when one is considering a set of beliefs, it is, I should have thought, relevant to know the sort of person who is the original proponent of those beliefs. It is perfectly true that the judge expressed himself in strong and forthright terms, but that is no ground for challenging his decision. Indeed, the notice of appeal contains no challenge to his findings of fact.

I would like to emphasize that those findings are binding only between these parties in this case. They form no precedent and create no estoppel in any other proceedings of whatever nature involving different parties and different issues, but the question remains whether the judge allowed himself to be so carried away by what he described as an immoral and socially obnoxious set of beliefs that he failed to exercise his discretion judicially.

It was, of course, a matter for the discretion of the judge whether or not he gave judgment in open court. It was not necessary for him to have done so and it was unfortunate that he gave as one of his reasons for doing so the protection of the public as well as the other reason, that is to say the importance of the reasons for his decision being publicly known so as to avoid rumour and speculation. I cannot say that he was wrong to do so.

Those matters added colour to the suggestion that what the judge primarily had in mind was the exposure of scientology rather than the interests of the

children which was in fact and in law all he was concerned with. However, towards the end of the judgment the judge did relate the practices of scientology to the circumstances of these particular children. He did carry out the balancing exercise. Although he plainly felt strongly that these children were at risk from exposure to scientology, I find no reason to suppose that in carrying out that essential balancing exercise he did not do so judicially.

At the end of his judgment at p 159B ante he said this:

'If they were to remain with the father and step-mother without conditions the process would go on with all the consequences to the children earlier described, including inevitably and ultimately alienation from their mother. It would be nothing short of disastrous for them.'

That is an important finding which was challenged by Mr Johnson. He said that there was no evidence that the children had been alienated from their mother. On the contrary, the father had done all in his power to maintain contact between the mother and the children. This is true up to date, but until 1982 the mother was herself also a scientologist and proceedings have been pending since June 1983. What the judge was concerned with was the future. It is plain from his findings that since the mother has, in the views of the 'church', reneged from scientology the father is likely to be under pressure to 'disconnect' - to use the scientology jargon - from her and would be likely to be disciplined if he did not. No doubt it was in recognition of this, having heard all the mother's evidence, that the father gave the assurance which he did, but for the reasons that I have already given this court cannot interfere with the judge's refusal to accept those assurances. As Mr Kennedy submitted at the end of his submissions, that must be conclusive in this appeal.

The judge having made the findings which he did about the practices of scientology, which were not challenged in this appeal, and the judge having refused to accept the father's assurances, I can find no ground on which this court could interfere with the judgment and the appeal is dismissed.

I desire only to refer to one other matter, and that is that following the judgment the mother granted an interview to a representative either of the Press or one of the media. We have a transcript of what occurred at that interview. She did it on advice and there was no reference to the children or to the case. What she was asked about was her experiences of scientology. It was an unwise course for her to take and she would be well advised never to do it again. It does not, in my judgment, constitute a breach of 5 12 of the Adminstration of Justice Act 1960. The terms of that section are somtimes forgotten by people who should know better and I will refer to them for the avoidance of any doubt, Section 12 is headed:

'Publication of information relating to proceedings in private (1) The publication of information relating to proceedings before any court sitting in private' [which Latey J was] 'shall not of itself be contempt of court except in the following cases, that is to say where the proceedings relate to the wardship or adoption of an infant . . .'

So any publication of any information which relates to the proceedings before Latey J would constitute a contempt of court.

JUDGMENTBY-2: PURCHASE LJ

JUDGMENT-2:

PURCHASE LJ: I agree that this appeal fails. In recognition of the able arguments of Mr Robert Johnson and in view of the important issues raised I add some words of my own.

The historical context of the appeal has been fully set out, both in the judment of Dunn LJ, just delivered and in the full judgment of Latey J and need not be repeated here. The judge was presented with a satisfactory status quo of some years standing which had only been disturbed by the unilateral action on the part of the mother during proceedings in the courts of the commonwealth country where she was presently living with the children, enjoying access. The judge recognized this in his judgment at p 138C ante in these terms:

'On the Saturday the mother took the children to the United States. She did so because she was in fear of losing them. She was cross-examined at some length about whether she did this knowing that an interim order had been made restraining her from removing the children. It does not affect the question I have to decide. It goes to credibility.'

That passage has been heavily attacked by Mr Johnson. The judge goes on:

'On the balance of probabilities she was told.' [That refers to the court proceedings.] 'Whether and to what extent she grasped it is another matter. As a result of the father's arrival she was in a state of shock. She know that he had come to get the children if he could and was in great fear that he would succeed. It is understandable that she did not absorb the niceties. She impressed me throughout as a wholly honest person. Nonetheless, she should not have done what she did do. It was done in panic. It was not in the better interest of the children. Nor was it right not to keep the father informed of the children's well-being. Apart from this one matter, so far as I can recall, her credibility has not been impugned.'

As Mr Johnson has submitted, read as it stands, there would appear to be an error in the judge's approach at this point of his judgment. That having been said, it is clear from the passage which I have just quoted that he was considering not only her credibility but also the effect of this behaviour on his assessment of the mother as a custodian.

Mr Johnson accepts that the judge posed the corect question to be considered by him at an early stage in his judgment, at p 138G ante. Referring to the status quo and the welfare report to which Dunn LJ has referred, the judge said this:

'If those alone were the factors, I think that the scales would probably come down in favour of not disturbing the status quo. Indeed, were it not for the scientology factor the mother painfully recognizes that she would not now attempt to disturb the status quo and she herself and her counsel have made that plain from the start.

What then is the scientology factor and what weight should be attached to it?'

Mr Johnson further concedes that the solution is a matter for the exercise of discretion on the judge's assessment of the evidence and that he, Mr Johnson, can only succeed if he can establish that in exercising that discretion he can show that the judge erred in principle or was plainly wrong. In developing these submissions, Mr Johnson submitted that in directing his attention to the extensive and heavy attack upon scientology in general, which formed the basis of the mother's case, he allowed the delicate and careful balancing process to become coloured and distorted. Mr Johnson further submitted that this is demonstrated by his making definitive findings about scientology in general rather than restricting his judgment to those aspects essentially relevant to the welfare of the children; and by his decision to deliver his judgment in open court notwithstanding the objection raised on behalf of the father.

Mr Johnson submitted that the judge's motivation was the public condemnation of scientology when that body had not had an opportunity of being heard, and that that amounted to a denial of natural justice from which the judge's exercise of discretion in deciding the question of custody could not be severed. If the court came to this decision, it was submitted, it had a duty to intervene.

A related but separate submission made by Mr Johnson was that the judge should have accepted the father's assurances that if the court required him so to do he would undertake to bring up the children unaffected by scientology and would himself withdraw from its practices. This involves establishing two separate points. Namely (1) that the father was a truthful and reliable person, and (2) that the father could make good his promises notwithstanding the proven climate of scientology. Only if each of these questions are answered in the affirmative can Mr Johnson's submission succeed. They are both questions essentially for the discretion of the judge and, therefore, the success of the submission on appeal must again depend on Mr Johnson being able to attack the judge's findings.

I now consider Mr Johnson's submissions in turn. In order to assess the danger, if any, to the children arising now and in the future from the father and step-mother's continued adherence to scientology, it was obviously necessary for the judge to consider in depth the vast amount of evidence on the topic of scientology which was made available and, in weighing that evidence, to draw inferences from the absence of contradictory evidence which might reasonably have been expected to be adduced if it existed. Mr Johnson submitted that the judge's approach was one-sided and that he should have placed greater weight on the evidence of the father that the objectionable practices described by the mother's witnesses and apparent from the written literature of scientology itself were unknown to him and or were no longer practised in England in any event. Mr Johnson also criticized the judge's dismissive approach to the evidence of Mr Karle, a consultant educational psychiatrist attached to Guy's Hospital who was called on behalf of the father, and his approach to the evidence of a young scientologist called Wakley who had had a successful training and career in engineering.

With respect to Mr Johnson, I cannot accept his submissions on this part of the case. Of course, not every part of the record of scientology and its teachings directly impinge on the points immediately at issue, but the judge was entitled to construct the complete background against which the particular questions could be considered. It may not have been strictly necessary for

him to have made definitive findings on collateral matters in the way that he did and in the terms that he did, but this does not, in my judgment, vitiate of itself the subsequent findings and decisions which he made in relation to the dangers to the children of being brought up under the aegis of scientology. That he was justified, on the evidence before him, in reaching his central findings on the latter question I have no doubt.

I wish only to refer to two short passages in the judgment. the first is at p 154B ante.

'Scientology' indoctrination of children

The objective of scientology is to capture the child and its mind.

The auditing - the processing - begins at an early age.'

The judgment continues with a substantial extract from the scientology literature which was incapable in practice of being refuted in the case. The importance of that extract is in relation to the indoctrination of children. At p 159B ante one finds the passages already referred to by Dunn LJ, in which the judge forms a conclusion on the evidence before him which, in my judgment, he was full entitled to reach, that if the children were to remain with the father and step-mother:

'. . . without conditions, the process would go on with all the consequences to the children earlier described including, inevitably and ultimately, alienation from their mother. It would be nothing short of disastrous for them.'

With respect to the judge, I cannot wholly follow his judgment in relation to the witness Wakley, whose account he describes as a sad episode and an example of a man whose brain has been so affected to be unable to objective assessment of scientology. However, the present case is different because Wakley was not exposed to parental conflict as will be the children in this case. If it were relevant to decide whether the judge was entitled to disregard a part of the evidence of a willing and 'successful slave' in a case such as this, I would hold the view that he could. It goes not merely to the credit of the witness but also to the question whether the door should be left open to a growing and developing child to choose at the appropriate time the pattern which his life is to follow, an opportunity which clearly, on the evidence, was denied to Wakley, notwithstanding his successful development.

On the main point, as to whether the judge was entitled to take the view that the evidence of the father demonstrated he was an unreliable witness, I have no hesitation in reaching the conclusion that the judge had ample justification for reaching this. The matter has already been fully considered by Dunn LJ, and there is nothing I can usefully add to what he has already said. A careful study of the transcript and the details of scientology which have already been summarized by Dunn LJ, demonstrate, on the evidence, that, where convenient, mendacity is an integral part of scientology.

The judge referred to this in his judgment at p 157C ante. He is referring to the criticisms of scientology in general, to which Dunn LJ has already referred. I only wish to quote from the third aspect cited by the judge in

these terms:

'It is dangerous because it is out to capture people, especially children and impressionable young people, and indoctrinate and brainwash them so that they become the unquestioning captives and tools of the cult, withdrawn from ordinary thought, living and relationships with others.'

The judge, subject to a final point to which I shall come in a moment, clearly had evidence upon which he could reach these conclusions and for my part, I find it difficult to see how anyone could have concluded otherwise.

As to the future of the father and the undertakings offered which, it is submitted by Mr Johnson, should have been received by the judge and accepted, I come to look at the two limbs to which I have already referred. The first limb, that is whether or not the father was a reliable witness, has already been determined adversely to him by the matters to which I have already referred. The second limb is also determined adversely to the father by the evidence found by the judge at p 159E ante.

'The father and step-mother remain totally committed to scientology. After much of the evidence had been given and they had read the written material . . . I hoped that their eyes might be opened and said that if that happened they should feel free to tell their advisers and the court. They did not. They did say that they "might stand back" from scientology while the children are growing up. I am afraid that that did not carry conviction. They remain afflicted by "scientology blindness". The father said he would seek to correct the evils disclosed during the hearing, but what could he do against the power of the "church"? Nothing. The result would be that he would be declared a suppressive person with all that that would entail for him and his family. Apart from the upheaval, new environment, new home, new school and new friends, the pressures of the "church" and of their own beliefs and consciences would be far too much of them. And to cut themselves and all the children off from scientology would have traumatic and emotional consequences on them and, through them, on the children.'

Those findings by the judge, in my judgment, conclusively establish that the second limb of the submission also fails. In the end Mr Johnson accepted that, in the event, all his submissions depend on his being able to establish his main point which, for want of a better expression, I will call 'the failure to exercise discretion judicially'. The submission that it would be a breach of natural justice to pass a definitive judgement about the merits or demerits of a religious sect, cult and any other body adhering to a code of behaviour or beliefs without giving a right of audience to that group, may well have considerable force in normal cases inter partes. It has, however, long been recognized that where the court is exercising its powers in relation to children, the paramount importance of ensuring the welfare of the children overrides any right of audience or reply even where a parent is concerned, let alone a person or persons outside the immediate context. The authority to which Dunn LJ has already referred - Re K [1965] AC 201 - there applies.

In discharge of his duty to consider the dangers inherent in exposure to scientology in relation to the questions of custody, the judge had to make definitive findings and the only possible criticism must relative to his decision to announce these publicly. Mr Johnson recognized this, but based

his submissions on the ground already referred to, namely the alleged intemperate use of language by the judge in his judgment; his delivery in open court, to support his contention that the judge's concentration in the judgment was one of public condemnation of scientology itself and, in so doing, he disqualified himself from exercising the delicate discretionary balance with which he was charged.

In order to succeed, in my view, Mr Johnson has further to establish that the judge's exercise of that discretion had become coloured or distorted. At this second stage, in my judgment, this appeal fails. It would be unnecessary for me to express any view about the phraseology of the judgment or the manner of its delivery. I do, however, agree with the submission by Mr Kennedy that at least the judge was justified in deciding to give the judgment in open court so that the reasons for his decision relating to the children should be generally appreciated.

I have carefully considered all the points so ably and forcefully made by Mr Johnson, but I cannot find any ground for saying that the judge's execution of the balancing duty, to which I have already referred, was either coloured or distorted. Mr Kennedy has reminded us that the judgment was reserved and delivered after 18 days. He has described it - and I cannot find any reason to object to his description - as a cool and deliberately damning analysis of mainline scientology; an analysis which the judge was under a duty to make.

In my judgment, neither the terms used by the judge - which, in my view, he was entitled to use - nor the fact that he decided to deliver that judgment in open court can be relied upon as an indicator that the judge was not applying the balanced unclouded mind which Mr Johnson emphasizes is required for this exercise.

I have not overlooked the other complaints made by Mr Johnson of the judgment, that is the passage indicating that the mother's unilateral action was irrelevant as being a matter which should have been taken into account but which was ignored on the one hand, or the exposition of the shortcomings of Mr Hubbard as being an example, on the other hand, of matters which should not have been taken into account. As I have said, I do not think the judge did ignore the effect of the mother's unilateral action in practice. The weight to be attached to that matter was one entirely within his discretion, and the weight that he applied to it was clearly minimal. The behaviour of Mr Hubbard was an integral part of the whole context of mainline scientology, an examination of which the judge had a duty to make and which he was entitled to announce as part of the background justification for his findings.

For these reasons and those given by Dunn LJ, I agree that this appeal must fail. I also agree with what Dunn LJ has said in relation to the conduct of the mother immediately after the hearing before the judge in relation to interviews that she had given to the media.

DISPOSITION:

Care and control of children to mother; reasonable access to father. No order for costs save legal aid taxation. Leave to appeal to the House of Lords refused.

SOLICITORS:
Stephen Bird & Co;

Tweedie & Prideaux

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